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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 431

FORD MOTOR COMPANY,
Complainant and Appellant,

—against—

CHESTER R. PACE, ET AL.,
Defendants and Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION AND APPENDICES

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Dated: September 19, 1960

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No. .....

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

Ford Motor Company, appellant herein, respectfully shows as follows:

Opinions Below

The opinion of the Supreme Court of Tennessee (Appendix A) and the opinion on rehearing (Appendix B) are reported in 335 S. W. 2d 360. The opinion of the Chancery Court of Davidson County (Appendix D) is not reported.

Jurisdiction

(i) Nature of proceeding and statute involved.

The Tennessee Motor Vehicle Sales Licenses Act, §§ 59-1701 to 1720, T. C. A., set forth in full in Appendix E, makes it a misdemeanor to engage in the manufacture or sale of motor vehicles in Tennessee as an automobile manufacturer, dealer or salesman without holding a license

under the Act. Appellant applied for its license under protest (Appendix H), stating that the statute was violative of appellant's Federal and state constitutional rights and reserving the right to contest its validity.

The Act establishes a Motor Vehicle Commission, whose members must be appointed from a list submitted by a private group of automotive dealers (§ 59-1703), and which to date has consisted solely of automobile dealers (Appendix L, p. 59a). The Commission is directed to revoke a manufacturer's license if it finds that the manufacturer has cancelled a dealer's franchise "unfairly, without due regard to the equities of said dealer and without just provocation" or done any of the other acts specified as grounds for revocation (§ 59-1714(g), (h)).

Appellant gave notice of termination to a Ford dealer in Newport, Tennessee, engaged in the distribution of Ford vehicles as part of its prosecution of interstate commerce (Appendix N), pursuant to the terms of his franchise (Appendix P), because of insufficient sales (Appendix O). The dealer filed a complaint with the Commission (Appendix F). The Commission cited appellant (Appendix J) to appear and defend itself against the dealer's charges.

Appellant thereupon brought suit in the Chancery Court of Davidson County, Tennessee, for an injunction prohibiting the Commission from proceeding with the hearing on the dealer's complaint and for judgment declaring the Act invalid under both the state constitution and the Due Process and Commerce Clauses of the Federal Constitution (see Appendix G).

The Chancellor held the statute unconstitutional and enjoined the hearing by the Commission (Appendix D). Appeal was taken by the Commission directly to the Supreme Court of Tennessee pursuant to § 16-408, T. C. A., which authorizes direct appeals to the State Supreme Court when constitutionality of a statute is "the sole determinative

question in the litigation". The Supreme Court of Tennessee sustained its jurisdiction under this provision stating, "We take jurisdiction only on the proposition that the constitutionality of the statute is the sole determinative question in the litigation (§ 16-408, T. C. A.). If this were not true, the jurisdiction of the case would be in the Court of Appeals" (Appendix A, p. 1a). On the merits, the Supreme Court of Tennessee sustained the statute and reversed the decree below, passing specifically upon the Federal questions raised in the complaint (Appendix A, pp. 1a, 8a, 9a, 15a, 17a), and, on rehearing (Appendix B) upon the question of the Contract Clause raised by petition for rehearing.

(ii) The appeal is timely.

The opinion of the Supreme Court of Tennessee was filed on March 11, 1960. The decree of reversal was entered on March 15, 1960 (Appendix C). Appellant filed a petition for rehearing, which was entertained by the Supreme Court of Tennessee, but denied by opinion filed May 4, 1960 (Appendix B).

The notice of the appeal to this Court was filed in the Supreme Court of Tennessee on July 28, 1960 (Appendix Q).

The appeal thus is timely. It was filed within 90 days after the judgment of the Supreme Court of Tennessee became final upon denial of the petition for rehearing. *Chicago G. W. R. R. Co.* v. *Basham*, 249 U. S. 164, 167 (1919); *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942).

(iii) Statutory basis for jurisdiction.

The Supreme Court of the United States has jurisdiction on appeal under the provisions of Section 1257(2) of Title 28, United States Code.

(iv) Cases sustaining jurisdiction.

The Federal questions were presented in the bill of complaint (Appendix G, pp. 50a, 51a). The Supreme Court of Tennessee rendered a decision in favor of the validity of the statute and, in its opinion, expressly ruled against appellant's contentions that the statute is repugnant to the Commerce, Due Process and Contract Clauses of the Federal Constitution (Appendices A, B, pp. 1a, 8a, 9a, 15a, 17a; 18a-20a). This Court therefore has jurisdiction on appeal. See *Whitfield* v. *Ohio*, 297 U. S. 431, 436 (1936); *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407 (1930).

Inasmuch as the Supreme Court of Tennessee decided the "sole determinative question in the litigation", nothing remains for the Chancery Court but to dismiss the complaint and dissolve the injunction. Therefore, the order of reversal by the Supreme Court of Tennessee is final for purposes of appeal here. See *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 72-74 (1946); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Clark* v. *Willard*, 292 U. S. 112, 118 (1934).

The disposition of a suit to enjoin a hearing before a state body is reviewable by this Court. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960); *Madruga* v. *Superior Court*, 346 U. S. 556 (1954). This Court has jurisdiction over the determination of appellant's request for declaration that the statute is violative of the Federal Constitution, as well as over its prayer for injunctive relief. *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 259-264 (1933).

(v) The statute involved.

The provisions of the Tennessee Motor Vehicle Sales Licenses Act (Ch. 17, §§ 59-1701 to 1720, T. C. A.) are set forth in full in Appendix E. The provisions here involved are as follows:

"* * *

"59-1703. Motor vehicle commission.—Appointment and qualifications of members.—There is hereby created the Tennessee motor vehicle commission to be composed of one (1) member from each of the nine (9) congressional districts of the state, and a chairman to be selected from the state at large, all to be selected and appointed by the governor of the State of Tennessee *from such list of properly qualified candidates, * * * as may be furnished to the governor by the Tennessee automotive association.* Each of the commissioners * * * shall * * * have been actually engaged in the manufacture, distribution, or sale of motor vehicles in the state of Tennessee for not less than five (5) consecutive years next preceding such appointment, and each must * * * be a holder of * * * a license at all times while a member of said commission. * * * (Emphasis added)

* * *

"59-1709. Activities for which license required. —(a) It shall be unlawful and constitute a misdemeanor for any person, firm, association, corporation or trust to engage in business as, or serve in the capacity of, or act as a manufacturer, distributor, or wholesaler, factory branch or distributor branch, factory representative, or distributor representative in this state without first obtaining a license therefor as provided in §§ 59-1710—59-1713.

* * *

"59-1714. Grounds for denial, suspension, or revocation of license.—The commission may deny an application for a license or revoke or suspend a license after it has been granted for any of the following reasons:

* * *

"(g) Being a manufacturer of [motor vehicles] * * * who has coerced or attempted to coerce any motor vehicle dealer:

"(1) To order or accept delivery of *any* motor vehicle or vehicles, appliances, equipment, parts, or accessories therefor or any other commodity or commodities which shall not have been *voluntarily* ordered by said motor vehicle dealer. (Emphasis added)

* * *

"(h) Being a manufacturer of motor vehicles, * * * who:

"(1) Has refused to deliver to any duly licensed motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new and unused motor vehicles sold or distributed by such manufacturer, * * * any motor vehicle publicly advertised for immediate delivery within sixty (60) days after such dealer's order shall have been received.

* * *

"(4) Has unfairly, without due regard to the equities of the said dealer and without just provocation, canceled the franchise of any motor vehicle dealer. * * *

* * *

"(6) Has attempted to enter into a franchise agreement with a dealer who does not at the time of the franchise agreement have proper facilities to provide the services to his purchasers of new automobiles which are guaranteed by the new car warranties issued by the manufacturers.

* * *

"59-1715. Hearing mandatory—Notice—Witnesses.— * * * if the commission shall *determine* that any licensee is *guilty* of *violation* of this chapter, his or its license *shall* be suspended or *revoked*. (Emphasis added)

* * *"

Federal Questions Presented

I. Whether the provisions of the statute authorizing revocation of a manufacturer's license by the Motor Vehicle Commission are invalid, on their face or as applied to appellant, under the Due Process Clause of the Fourteenth Amendment of the Federal Constitution since:

A. Bias and prejudice against the manufacturer, and pecuniary interest in issues before the Commission, are inherent in the Commission because

(1) the statute (§ 59-1703), as applied and as interpreted by the Supreme Court of Tennessee, requires that the Commission be composed exclusively of automobile dealers who are selected from a list supplied by a private association of automotive dealers; in spite of the fact that

(2) each of the grounds for revocation specified in § 59-1714(g) and (h) of the statute involves controversies between a manufacturer and a dealer as to which dealers cannot be considered impartial and in which members of the Commission, all of whom are automobile dealers and a majority of whom are franchised new car dealers, have a pecuniary interest.

B. The statutory language is so vague and uncertain that it is not reasonably possible to ascertain the limits of the conduct proscribed.

II. Whether the statute is repugnant to the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3, since it unduly interferes with the flow of interstate commerce without clear necessity to do so by:

A. Authorizing disruption of interstate commerce through mandatory revocation or suspension of a motor vehicle manufacturer's license to do business in the State of Tennessee if the Commission shall find that such manufacturer has violated the statute in its relations with a single dealer.

B. Imposing restraints upon the volume of interstate commerce for local economic advantage by:

"(1) prohibiting a motor vehicle manufacturer from requiring a dealer to order or accept delivery of 'any' new vehicle not 'voluntarily' ordered, even though the dealer may have failed to exert sufficient sales effort to fulfill his agreement and to give the manufacturer adequate representation;

(2) requiring that a motor vehicle manufacturer deliver to Tennessee dealers all vehicles that are publicly advertised for immediate delivery, within 60 days after ordered, even though there is a shortage in interstate commerce as frequently occurs when new models are first introduced; and

(3) imposing undue restrictions upon termination of ineffective dealers and upon enfranchisement of replacement dealers and additional dealers.

III. Whether the statute, as applied to appellant, violates the Contract Clause of the Federal Constitution, Art. I, § 10, and the Due Process Clause of the Fourteenth Amendment by impairing, without clear necessity, the exercise of appellant's contractual right to terminate ineffective dealers.

Statement

See the facts set forth under "Nature of proceeding and statute involved", p. 2-3 *supra*.

The Federal Questions are Substantial

I. THE VIOLATION OF DUE PROCESS

(a) Bias in the Tribunal

Section 59-1703 of the statute, as applied, makes certain the presence of prejudice and pecuniary interest in the Tennessee Motor Vehicle Commission ("Commission").

All ten of the members of the Commission, authorized by the statute to hear dealers' charges against appellant, are current automobile dealers (Appendix L, p. 59a). As said by the Supreme Court of Tennessee in its opinion (Appendix A, p. 12a):

> "A rather vicious attack is made upon the Section of the Act (59-1703) *which makes the Commission consist solely of dealers* who are selected by the Governor *from a list submitted by the Tennessee Automotive Association.*" (Emphasis added)

According to the defendant Pace, the Executive Director of the Commission, the statute was sponsored and lobbied through the legislature by the same Association (Appendix K, p. 57a).

The Association interpreted its duty under the statute to be to submit only "dealers" as nominees for the Commission. Exhibits 1-7 of the deposition of the Vice President and General Manager of the Association (Appendix M, p. 60a) set forth resolutions of the Association specifying the lists of names submitted to the Governor for nomination to the Commission. Each one on each list was stated to be an automobile "dealer". The preambles to each such resolution were similar to the first, which was as follows:

> "Whereas, by Section 3 of Chapter 79 of the Public Acts of 1955 (Section 59-1703) Tennessee

> Automotive Association is charged with the *duty* of submitting the names of at least *20 automobile dealers,* * * * from which the Governor will appoint the Tennessee Motor Vehicle Commission; * * *." (Emphasis added)

Nine of the ten present members of the Commission are enfranchised new car dealers; one is a used car dealer (Appendix L, p. 59a). Although lists submitted by the Association* contained the names of several used car dealers, the Association by another resolution stated that it was important to explain to used car dealers

> "* * * the need for a majority of franchised dealers being on the Commission for the reasons that a higher percentage of the problems raised are related to matters between the manufacturer and the franchised dealer * * *." (Appendix M, p. 68a)

Each of the grounds specified in subparagraphs (g) and (h) of § 59-1714 involves disputes between manufacturers and dealers on which opinions may reasonably differ.

Thus, (h)(1) has its chief impact when demand for the new vehicles is in excess of supply and a manufacturer must allocate cars among all its dealers throughout the United States. For example, during the early part of a model year, the dealer can sell cars with little price competition or sales effort. As a result, the dealer makes a relatively high profit per new car sold. During this period the dealer implores the manufacturer to allocate a larger share of cars to his dealership than would be fair in the circumstances. Subdivision (h)(1) compels preference for Tennessee dealers over consumers and dealers in other states

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*Most of the new car dealers in Tennessee, called "franchised car dealers", are members of the Tennessee Automotive Association, and constitute about 90% of the membership of that Association (Appendix L, p. 58a).

in the distribution of new models, by providing for revocation of the license of a manufacturer who has "refused" to deliver to any Tennessee dealer, within 60 days after order, any vehicle publicly advertised for immediate delivery.

Later in the season, however, as the production of new models increases, the shortage disappears, and the manufacturer often endeavors to persuade dealers to order and sell more cars. At this time, increasing price competition from other dealers normally is encountered and greater sales effort is required by the dealer. As a result, a large volume of sales can be achieved only if the dealer is willing to accept a lower profit per car sold (Appendix I, p. 54a). During this period the manufacturer implores each dealer to order and sell more cars. But (g)(1) is designed to inhibit the efforts of the manufacturer to induce the dealer to order and accept such cars.

Differences of opinion between manufacturers and dealers are also involved in the issues in this case under subdivision (h)(4) relating to termination inasmuch as (h)(4) tends to prevent termination as a means of eliminating dealers who, shielded by (g)(1), (2) and (3), do not make sufficient purchases and sales to provide adequate representation for the manufacturers.

In addition to the prejudice created by the fact that each Commissioner is a dealer,* the requirements of § 59-1703 that each also be a holder of a license ensures current pecuniary interest in matters coming before them involving disputes between manufacturers and franchised dealers.

Each new car dealer on the Commission has a direct interest in the most far-reaching interpretation and enforce-

*Indeed, the Hearing Officer of the Commission (the defendant Pace, also the Executive Director) in his testimony disclosed facts from which actual prejudice on his part might be inferred from his characterization of his experiences as a dealer. (Appendix K, p. 56a.)

ment of these provisions against appellant. In fact, there must be present in the mind of each such dealer an awareness of the possibility that some day he himself may file an identical charge against the manufacturer who enfranchised him. Those Commissioners who are franchised by the *same* manufacturer as the complaining dealer are even more obviously identified in interest with the complainant because a ruling in favor of the complaining dealer assures identical protection throughout the state for all dealers in that category, including members of the Commission.

Each Commissioner also has a pecuniary interest as an actual or potential competitor of the complaining dealer. For example, if the complainant is a Ford dealer, the Commissioners who are Chrysler or General Motors dealers have a pecuniary interest in vigorous enforcement of (g)(1) and (h)(4) and (6), against Ford in order to curtail statewide selling efforts of Ford and its dealers, thus reducing actual or potential competition by Ford products.

Bias through both prejudice and pecuniary interest is *inherent* in the statutory scheme; instead of preventing bias, the statutory scheme, as administered, is calculated to assure bias.* The statutory scheme is therefore the deliberately created antithesis of due process.

The rule is stated by Mr. Justice Black in *In Re Murchison*, 349 U. S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to *prevent* even the probability of unfairness. * * * This

*Systematic bias in the composition of a tribunal has also been held to violate the Equal Protection Clause. *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). These decisions implement the basic tradition of requiring an impartial tribunal, represented by *Dr. Bonham's Case*, 8 Co. Rep. 114a, 2 *Brownl.* 255, 77 Eng. Rep. 647 (C. P.) as early as 1610.

> Court has said, * * * that 'every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio*, 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the *appearance* of justice.' *Offutt* v. *United States*, 348 U. S. 11, 14." (Emphasis added)

And this Court stated in *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927):

> "* * * No matter what the evidence was against [a party] he had the right to have an impartial judge. * * *"

The foregoing statements of principle apply to civil as well as criminal cases. See *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205-6 (1944); *Hansberry* v. *Lee*, 311 U. S. 32, 45 (1940); *Brady* v. *Trans World Airlines, Inc.*, 167 F. Supp. 469, 472 (D. Del. 1953). Thus, Mr. Justice Brandeis, concurring in the rate determination case of *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936), pointed out that (p. 73):

> "* * * The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings * * * are correct, but that the trier of the facts shall be an impartial tribunal: * * *."

In the leading House of Lords case of *Frome United Breweries Co.* v. *Bath Justices*, (1926) A. C. 586, where denial of renewal of a license was set aside on the ground that there was a real likelihood that the tribunal was biased. Viscount Cave said (p. 590):

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and * * * if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be *assumed,* he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. * * *" (Emphasis added)

See the similar standards enunciated by Mr. Justice Frankfurter in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 466-67 (1952).

These principles apply here, because as stated in *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960), "* * * when governmental agencies *adjudicate or make binding determinations which directly affect the legal rights of individuals,* it is *imperative* that those agencies use the procedures which have *traditionally been associated with the judicial process.* * * *". (Emphasis added)

The prejudicial effect of the bias in the Commission renders the statute especially lacking in due process because free play of bias could be the controlling factor in a determination against appellant, without any assurance of detection upon judicial review. The grounds specified in § 59-1714(g) and (h) of the statute for revocation of a manufacturer's license, by their terms call for ultimate conclusions to be reached by the Commission based on their opinions in matters as to which reasonable men may differ. Opinions on whether an order was "coerced" or "voluntary"; or whether a cancellation of a franchise was made "unfairly", or "without just provocation", or "without due

regard to the equities of the said dealer" will vary from man to man and necessarily be influenced by whether the one giving vent to his opinion is engaged as a manufacturer or dealer. Thus, the latent effect of any bias could never be evaluated on review of a Commission decision.

In *Berger* v. *United States*, 255 U. S. 22, 36 (1921), this Court said:

> "* * * The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

The principle was recognized by Mr. Justice Harlan in *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 496 (1957):

> "* * * What is to be the scope of such [judicial] review? How is the inherent bias of * * * members of these boards to be overcome? * * * "

Furthermore, even though § 59-1717 T. C. A. provides for judicial review, under Tennessee law only the question of whether the Commission acted within its jurisdiction, illegally, arbitrarily or fraudulently will be open to review.*

The prejudice to appellant by reason of bias in the tribunal is further aggravated by a mandatory penalty that is unnecessarily harsh. In contrast to a provision for compensatory damages, the statute directs revocation or suspension of appellant's license to continue business relations with all of its dealers in the State. The *in terrorem* effect of the statutory scheme thus is obvious. The threat of loss

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*See *Real Estate Commission* v. *McLemore*, 202 Tenn. 540, 306 S. W. 2d 683 (1957); *Hughes* v. *Board of Com'rs of City of Chattanooga*, 319 S. W. 2d 481 (1958); *Boyd* v. *General Motors Acceptance Corporation*, 330 S. W. 2d 13 (1959).

of a license to do business in the state necessarily tends to force manufacturers to avoid submission to an inherently biased Commission of controversies with individual dealers, and instead to forego their rights in such controversies regardless of the merits for fear of losing their licenses to do business in the state. This is, in itself, a further denial of due process. See *Ex parte Young*, 209 U. S. 123 (1908); *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

(b) The statutory language is so vague and uncertain that it is impossible to ascertain the limits of the conduct proscribed.

Section 59-1714(g)(1) fails to provide any ascertainable standard as to what extent mere salesmanship on the part of appellant would constitute having "attempted to coerce any motor vehicle dealer" to order vehicles "which shall not have been *voluntarily* ordered by said motor vehicle dealer." By contrast with the Tennessee statute, the Federal Automobile Dealer Franchise Act specifically provides that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 U. S. C. § 1221(e).

An ascertainable standard likewise is lacking in § 59-1714(h)(4), which provides for revocation where a manufacturer cancels a franchise

> "* * * unfairly, without due regard to the equities of said dealer and without just provocation * * *."

The Supreme Court of Tennessee held that these words could be "fairly" administered by simply applying "the ordinary meaning of such terms" (Appendix A, p. 11a). But there is no recognized meaning for the term "equities of the said dealer", especially where the franchise is terminable at will. The terms "equities of said dealer" and "just provocation" are so vague as to leave appellant uncertain as to

what conduct will or will not subject it to the drastic penalty of loss of its license to do business in the State. There is no way in which appellant could guide its conduct so as to be assured that it was within the statutory standards, because these terms have no definite meaning in the context of a contractual relationship with a distributor which is terminable by either party on notice under the agreement.

Section 59-1714(g)(1) would indicate that "just provocation" does not include failure of the dealer to give adequate representation; but beyond this, appellant is given no guidance. The term "equities of said dealer" *could* refer to any number of factors such as length of service, investment, past profitability, or others, but the statute is silent as to which factors *are* relevant. The effect, if the Act is sustained, is necessarily to inhibit appellant from canceling any dealer's franchise for any reason because of uncertainty as to whether license revocation may follow.

When the inherently vague term "unfairly" is placed in juxtaposition with "the equities of said dealer", a term without any distinctive or definite meaning of its own, the combined effect is to authorize the Commission to act by subjective determination unconstrained by any ascertainable standard. This results in a denial of due process within the principles enunciated by Mr. Justice Frankfurter in his concurring opinion in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), where he said (532):

> "* * * Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. * * *"

Justice Frankfurter cited: *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925); *Winters* v. *New York*, 333 U. S. 507 (1948); *Kunz* v. *New York*, 340 U. S. 290 (1951).

It makes no difference that the statute may impose license revocation rather than a criminal penalty as its sanction, particularly where the impact could be as drastic as here. As said in *A. B. Small* v. *American Sugar Refining Co.*, *supra* (p. 239):

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. * * *".

Words identical to those in subdivision (h)(4) were held to be fatally vague, as used in a Colorado statute, when they came under scrutiny by a three-judge Federal Court in *General Motors Corporation* v. *Blevins*, 144 F. Supp. 381 (D. C. Col. 1956). There, the Court said (395-96):

> "General Motors urges that this part of the 1955 act violates the Fourteenth Amendment in that it fails to provide an ascertainable standard of guilt and hence denies due process. We agree.
>
> * * *
>
> "The section of the 1955 act now under consideration uses the terms 'unfairly', 'without due regard to the equities', and 'without just provocation'. These involve 'so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result'. *Cline* v. *Frink Dairy Co.*, supra,

274 U. S. at page 465, 47 S. Ct. at page 687. Accordingly, due process is denied."

No appeal was taken to this Court from the decision in the *Blevins* case.

II. THE STATUTE IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE.

Each of appellant's franchised dealers in the State of Tennessee constitutes an integral part of its system for national distribution of automotive vehicles in interstate commerce. See Appendix N; *Howell Chevrolet Co.* v. *NLRB*, 346 U. S. 482 (1953).

The volume of vehicles sold by a manufacturer in commerce in Tennessee is governed by the effectiveness of its dealers in making sales. Where a particular dealer's sales consistently fall significantly below the average sales of other dealers comparably situated, it becomes necessary for the manufacturer to consider replacing the dealer. In such circumstances, the dealer usually resigns and sells out to a successor because his operations are as unsatisfactory to him as they are to the manufacturer. Occasionally, however, such a dealer refuses to resign, necessitating cancellation of his sales agreement.

In recent years, dealers have resorted to political action to obtain Federal and state legislation concerning the termination problem. The Congress, mindful of its prime responsibility for the regulation of interstate commerce, has approached the problem in a manner calculated to safeguard the free interplay of competitive forces in commerce. To this end, the Congress placed no restriction upon a manufacturer's right to sell in commerce, to replace inefficient dealers, or to appoint added dealers where required to remain competitive (70 Stat. 1175; 15 USCA §§ 1221-25).

The Federal Act simply gave to dealers a right to sue in the Federal courts for compensatory damages without in any way affecting the manufacturers' rights to continue to do business and to take all reasonable steps to maintain and enhance the efficiency and competitiveness of their dealer outlets.*

By contrast, Tennessee has approached the problem by placing heavy burdens and restrictions on the free flow of interstate commerce.

(a) Arbitrary disruption of the flow of commerce.

Instead of attempting to provide compensation for a dealer allegedly wronged, as does the Federal Act, the Tennessee statute adopts the sole sanction of threatening to stop the entire flow of the manufacturer's vehicles into the state through revocation or suspension of the manufacturer's license to do business in the state. This is a drastic and wholly unnecessary** obstruction of interstate commerce. Complete exclusion of an interstate business from a state has always raised serious questions under the Commerce Clause. See *Castle* v. *Hayes Freight Lines*, 348 U. S. 61 (1954); *Leisy* v. *Hardin*, 135 U. S. 100 (1890).

To permit a state to disrupt interstate commerce so drastically without any clear necessity to do so would be destructive of the very purpose of the Commerce Clause. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 781-82 (1945); cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951).

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*The Federal Act, however, raises several other serious questions, some of a constitutional nature, which ultimately may have to be resolved by this Court.

**See the opinion of the Chancellor, Appendix D, p. 23a-24a.

(b) Restraints upon the volume of commerce for local economic advantage.

The combined effect of the provisions of § 59-1714(g) and (h) of the statute is to regulate the flow of commerce for the economic benefit of local dealers.

Section 59-1714(g)(1) enables a Tennessee dealer to prevent a manufacturer from requiring him to provide effective sales representation* as a condition to his use of the manufacturer's name and to the grant to him of the opportunity to purchase automobiles at wholesale prices. This tends to prevent reaching by the manufacturer of his potential market in interstate commerce.

Section 59-1714(h)(4) effectively prevents appellant, upon pain of exclusion from the state, from terminating its relationship with a dealer even though he refuses to order enough vehicles to satisfy the potential demand as revealed by the orders of other dealers and by new car registrations of competitive vehicles in the same price-class. At the same time the appointment of additional dealers to reach the untapped demand is deterred. Subsection (h)(6) makes it a cause for license revocation to appoint a new dealer unless "at the time of the franchise agreement" he already has "proper facilities". This is a condition which, as a practical matter, often can be satisfied only where an existing dealer voluntarily resigns and sells his facilities to the replacement dealer. Where there is no existing dealer, obviously assurance of the franchise must precede the acquisition of facilities.

The combined effect of § 59-1714(g)(1), (h)(4) and (h)(6), therefore, is to enable franchised new car dealers

*The complaining dealer in the case at bar was notified of termination for failure to perform his obligations under the Ford franchise. Appendix F sets forth the dealer's charge; Appendix O sets forth a summary of the evidence showing unsatisfactory sales and operations by this dealer necessitating termination.

in Tennessee to limit the flow of commerce into Tennessee to shield themselves from the competition of vehicles which would otherwise move into the state. As a result, the franchised automotive dealer in Tennessee is able to stand as a barrier between the manufacturer and the potential customers and, in effect, set up a toll gate which limits the flow of vehicles to customers to that volume which the dealer finds will yield him the profit per new car sold which he deems best suited to his own interests. State regulations of interstate commerce affecting interests outside the State, as here, have been subjected to exacting scrutiny by this Court because the normal political restraints relied upon to assure the fairness of legislation are absent where the interests affected are not represented in the state Legislature. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767-8 n. 2 (1945) and cases cited.

Here the burden is severe, and possible benefit to local economic interests such as the Tennessee dealers cannot justify the detriment to interstate commerce imposed by the statute. See *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 530-39 (1948); *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511 (1935); *Buck* v. *Kuykendall*, 267 U. S. 307, 315 (1925). In these circumstances, the severe burden upon commerce imposed by the statute cannot be sustained. Compare *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520 (1959).

(c) Restraint upon shipment into other states by compelling allocation to Tennessee.

The effect of § 59-1714(h)(1) is to require a manufacturer, during periods of shortage, to allocate to the State of Tennessee every vehicle publicly advertised for immediate delivery within 60 days after order by a Tennessee dealer. Since each manufacturer spends large sums in national ad-

vertising to stimulate demand in every state, the effect of the statute is to compel manufacturers to curtail allocations of vehicles to other states in order to comply with orders from Tennessee dealers. The result is discrimination against other states and in favor of Tennessee, which is prohibited by the Commerce Clause. *See Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); *Nippert* v. *Richmond*, 327 U. S. 416 (1946). In addition, the provision reaches out beyond the borders of the state to compel action for local benefit, which is also in violation of the Commerce Clause. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521 (1935).

The combined effect of the subdivisions (g) and (h) is to Balkanize areas of commerce in violation of the basic concept of our Federal Constitution that the states shall constitute a single economic unit. *See Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769-781 (1945); *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 532 (1949).

(d) Monopolization of channels of distribution.

The tendency of the Tennessee statute to freeze existing outlets, contrary to the policies of the Federal antitrust laws, is further implemented by the wording "without due regard to the *equities* of the said dealer" in § 59-1707-(h)(4). The Congress of the United States rejected comparable language proposed for the Federal Automobile Dealer Franchise Act in 1956. The Senate bill (S. 3879) had required manufacturers to act in a "fair, equitable and nonarbitrary manner so as to guarantee" the dealer freedom from "coercion" and "to preserve all the equities" of the dealer which are "inherent in the nature of the relationship". This language was dropped, however, by amendment in the House, as pointed out in the House Report on the bill (H. Rep. No. 2850, 84th Cong. 2d Sess. (1956) pp. 8-10):

> "* * * the committee deleted the provision which would require a party to a franchise to preserve 'all

the 'equities' of the other party which are inherent in the nature of the franchise relationship. This has been done to preclude any interpretation inconsistent with antitrust principles. * * *"

* * *

"The bill * * * does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.

"The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation. Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment."

The background of the rejection of the "equities of the dealer" language by the House Committee is particularly significant.

During the hearings, Herbert N. Maletz, counsel for the Committee, quoted as follows from a letter to the Committee by Attorney General William P. Rogers:

"* * * Antitrust difficulties * * * are immediately apparent. In the light of automobile industry history for example, the term 'equities of the dealer' might well include the dealer's right to be free from competition from added franchise dealers. * * *

"As a result, this language might deprive newcomers of their fair chance to enter the auto-dealer business and, in the process, seriously restrain distribution of new cars.

"Even more broadly, this phrasing could be read to require a manufacturer to guarantee against a dealer's unprofitable operation or depreciation of investment * * *.

"* * * H. R. 11360 * * * could apply to a manufacturer * * * to gear his production and distribution, to preserve each dealer's profitable investment.

"Thus, building for dealers a sanctuary from the rigors of competition seems at odds with the basic principles of antitrust. It could effectively prevent manufacturers from responding with production or price changes to the stimuli of a free market. * * *" (*Automobile Dealer Franchises*, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary on H. R. 11360 and S. 3879, 84th Cong., 2d Sess. at 18-19 (1956)).

By its use of terms expressly rejected by Congress, the Tennessee Act invites the kind of anti-competitive consequences that the Congress sought to avoid when it passed the Federal Act.

This legislative history of the Federal Act, the national policies underlying the Sherman Act itself, and the provision of the Federal Act (15 U. S. C. § 1224) to the effect that it shall not even "indirectly" modify the antitrust laws, are relevant to the balancing of conflicting local and national interests under the Commerce Clause. See *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 773 (1945); *Parker* v. *Brown*, 317 U. S. 341, 367 (1943). And in light of § 1224, the further provision (§ 1225)—to the effect that the Federal Act will not supersede state law except in case of "direct conflict"—cannot be taken as congressional

consent to the type of regulation of commerce involved here, which is offensive to both antitrust principles and the Commerce Clause as interpreted by this Court.

While subdivisions (g) and (h) of the Tennessee Act are phrased in terms of action affecting the individual dealer, the overall effect of the statue is a regulation of the volume and channels of interstate commerce in automotive vehicles by a private group, the Tennessee Automotive Association, which nominates all members of the Commission. As pointed out by the Chancellor in his opinion (Appendix D, p. 23a), the statute vests the Commission with "such power that it *would* control the automotive business in the entire state of Tennessee". (Emphasis added)

The end result is thus a power of regulation and restraint over commerce contrary to the Commerce Clause and the policies of the Federal antitrust laws, recognized by Congress in the Federal Automobile Dealer Franchise Act. The antitrust implications are comparable to those found by this Court in *Associated Press* v. *United States*, 326 U. S. 1, 19 (1945):

> "* * * Here as in the *Fashion Originators' Guild* case, 'the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "*trenches upon the power of the national legislature* and violates the statute." '* * *" (Emphasis added)

In this regard, the following discussion during the appearance of Hon. Robert A. Bicks, then Legal Assistant to the Assistant Attorney General in charge of the Antitrust Division, before the House Subcommittee is particularly significant:

> "Mr. Bicks. * * * this phrasing ['equities of the dealer'] could tend to perpetuate existing dealers in

business—regardless of market pressures—and, indeed, require each manufacturer to guarantee against unprofitable operation or depletion of investment.

"Mr. McCulloch. I would like to interrupt right there.

"If that would result, isn't that contrary to all the concepts and all the experiences in our economic life in America up to this time?

"Mr. Bicks. Absolutely, it is completely inconsistent with our private-enterprise system.

"Mr. Keating. It is completely inconsistent with our free-enterprise system, is it not?

"Mr. Bicks. It is a return to something akin to medieval guild concept.

"Mr. Keating. It would freeze established dealers and prevent new dealers from going into the business?

"Mr. Bicks. That is absolutely right.

"Mr. Keating. It is inconceivable that Congress would do a thing like that.

"Mr. McCulloch. It certainly wouldn't be in the best interests of the consumer, or the purchasers, or the dealers.* * *" *Automobile Dealer Franchises,* Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, on H. R. 11360 and S. 3879, 84th Cong., 2d Sess. (1956), p. 263. See also Mr. Bicks' prepared statement, *id.* at 267, 274.

III. THE STATUTE VIOLATES THE CONTRACT CLAUSE AND IS CONFISCATORY IN VIOLATION OF THE DUE PROCESS CLAUSE.

Appellant has expended many millions of dollars in plants, equipment and facilities to manufacture motor vehicles for sale in interstate commerce. Its system for national distribution consists of franchised dealers throughout the United States, which it has assembled at great expense over a period of many years. Appellant is capable of

earning a return on its investment only in proportion to the effectiveness of its dealers in the sale of vehicles in competition with dealers for other manufacturers.

A Ford franchise enables a dealer to join, and be an integral part of, this well established nation-wide system of distribution of readily salable products. From the outset, the dealer trades on the good will of Ford. The demand for the product is such that he is assured of a substantial volume of business that comes under the Ford sign. If a Ford dealer does no more than take orders, he is in the nature of a free-loader; he skims the cream; he generates no business in competition with other make vehicles; and he provides little or no price competition for the benefit of the consumers.

The Ford franchise, adopted prior to passage of the Tennessee Statute, contemplates that the dealer would "develop" the sale of Ford products and that, if he failed to do so, the privilege of remaining an authorized dealer, of trading under the Ford name, would be withdrawn by termination on notice (Appendix P, p. 81a).

The right to terminate relations with dealers whose performance is unsatisfactory is essential where the dealer cannot or will not fulfill his obligations under the franchise agreement. The Tennessee Statute, as applied to the complaining dealer here, seriously impairs (without controlling justification in the public interest [cf. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 108-09 (1938)]) that right of appellant, a right that it must have if it ultimately is to maintain the efficiency of its distribution system. It therefore violates the Contract Clause of the Constitution of the United States.

The Tennessee Statute also constitutes a taking of appellant's property without due process of law by impairing the right to terminate for inefficiency in sales. The effect is to appropriate appellant's investment in the plants and facilities, located outside the state, for the benefit of the

existing Tennessee dealers to whom the statute transfers all control over the volume of sales of appellant's products to customers in the state. This constitutes confiscation of appellant's contracts and properties for the economic advantage of the dealers in Tennessee in violation of the Due Process Clause, as well as the Commerce Clause.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of this appeal and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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Dated: September 19, 1960